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11 SERVICING LLC, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., WRIGHT,  
12 FINLAY & ZAK, LLP and RENEE M. PARKER, ESQ.

13 **UNITED STATES DISTRICT COURT**  
14 **WESTERN DISTRICT OF WASHINGTON (TACOMA)**

15 JAMES A. BIGELOW  
16 Plaintiff,  
17 vs.  
18 NORTHWEST TRUSTEE SERVICES,  
19 INC.; GREEN TREE SERVICING, LLC;  
20 MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC.;  
WRIGHT, FINLAY & ZAK, LLP, TICOR  
TITLE COMPANY, NATIONWIDE TITLE  
INSURANCE COMPANY, RENEE  
PARKER, AND DOE DEFENDANTS 1-20,  
21 Defendants.

Case No.: 3:14-cv-05798 BHS

**MOTION FOR SUMMARY JUDGMENT  
BY DEFENDANTS GREEN TREE  
SERVICING LLC, MORTGAGE  
ELECTRONIC REGISTRATION  
SYSTEMS, INC., WRIGHT, FINLAY &  
ZAK, LLP AND RENEE PARKER**

Noting Date: June 24, 2016

I. RELIEF REQUESTED

DITECH FINANCIAL LLC as successor in interest to GREEN TREE LOAN  
SERVICING LLC, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., WRIGHT,  
FINLAY & ZAK, LLP and RENEE M. PARKER, ESQ. (erroneously sued as Renee Parker)  
(hereafter, "Defendants" collectively), by and through its counsel of record, Renee M. Parker of

1 Wright, Finlay & Zak, LLP, hereby bring this Motion for Summary Judgment on the grounds that  
 2 there is no triable issue of material fact in this matter and that the Defendants are entitled to  
 3 judgment as a matter of law.

4 **II. IDENTIFICATION OF PARTIES AND STATEMENT OF FACTS**

5 **A. IDENTIFICATION OF PARTIES AND PROPERTY**

6 JAMES BIGELOW (“Plaintiff” singularly) is the sole Plaintiff in the instant litigation.  
 7 The Subject Property, defined below, is owned by Plaintiff and non-party CAROLYN BIGELOW  
 8 (hereinafter “Borrowers” collectively).

9 The real property at issue is commonly known as 10018 CASCADIAN AVENUE SE,  
 10 YELM, WASHINGTON 98597 (“Subject Property”), and legally described in the Deed of Trust.

11 DITECH FINANCIAL LLC as successor in interest to GREEN TREE LOAN  
 12 SERVICING LLC (hereinafter “Green Tree” collectively) services the Loan on behalf of the  
 13 Federal National Mortgage Association (“Fannie Mae”), and is the holder of the Note. Green Tree  
 14 is the assignee of the Deed of Trust. Green Tree and Ditech Financial LLC (“Ditech”) are both  
 15 Delaware limited liability corporations currently registered with the Washington Secretary of  
 16 State to conduct business in Washington State under UBI No. 602302513. Fannie Mae is a  
 17 federally chartered corporation having a principal office in Washington, DC.

18 MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (“MERS”), a  
 19 Delaware corporation with its principal place of business in Virginia, is identified as the original  
 20 beneficiary under the Deed of Trust as nominee for the original lender, lender’s successors and/or  
 21 assigns. MERS does not “conduct business” in the State of Washington pursuant to RCW  
 22 23B.15.010(2)(g)–(h).

23 Wright Finlay and Zak, LLP (“WFZ”) is the law firm representing Ditech, Green Tree and  
 24 MERS, and Renee M. Parker (“Parker”) is its attorney of record in this action. Parker is licensed  
 25 as an attorney under Washington State Bar Association No. 36995.

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27 //

## **B. STATEMENT OF FACTS**

2 On or about April 25, 2007 the Borrowers executed a promissory note in the amount of  
3 \$233,899.00 in favor of Pierce Commercial Bank. (“Note”) A true and correct copy of the  
4 original Note is attached as **Exhibit “A”** to the Declaration of Ditech Financial LLC as Successor  
5 in Interest to Green Servicing LLC in Support of Motion for Summary Judgment (“Green Tree  
6 Declaration”). Pierce Commercial Bank is a failed bank, and was closed on November 5, 2010;  
7 the Federal Deposit Insurance Corporation (“FDIC”) was named as receiver.<sup>1</sup>

8        The Note is secured by a Deed of Trust encumbering the Subject Property, and to which  
9 MERS was identified as the beneficiary in a nominee capacity for the lender and lender's  
10 successors and assigns; the Deed of Trust was recorded with the Thurston County Auditor on  
11 April 27, 2007 as Instrument No. 3922368.<sup>2</sup> The Note and Deed of Trust are collectively  
12 referenced herein as the "Loan."

13        The Loan was transferred to Green Tree on or about December 1, 2011.<sup>3</sup> The Corporate  
14 Assignment of Deed of Trust (“Assignment”) was recorded with the Thurston County Auditor on  
15 April 20, 2012 as Instrument No. 4261697.<sup>4</sup> Green Tree appointed NWTS as successor trustee on  
16 or about May 14, 2012; an Appointment of Successor Trustee was recorded on or about May 18,  
17 2012.<sup>5</sup>

18 Ditech merged with Green Tree on or about September 2, 2015 and Ditech was the  
19 surviving corporation.<sup>6</sup> Green Tree and Ditech were both owned by Walter Investment  
20 Management Corp. prior to this merger.<sup>7</sup> Ditech, as successor in interest to Green Tree, currently  
21 holds the Note and also services of the Loan on behalf of Fannie Mae.<sup>8</sup>

<sup>1</sup> <https://www.fdic.gov/bank/individual/failed/piercecommercial.html>. See also, SAC (Dkt. 44) at ¶ 52.

<sup>2</sup> Request for Judicial Notice ¶ 1, Ex. 1 (hereinafter “RJN”)

<sup>3</sup> Green Tree Decl. at ¶ 8.

25 |<sup>4</sup> RJD at ¶2, Ex. 2.

<sup>5</sup> RJN at ¶ 3, Ex. 3.

<sup>6</sup> Green Tree Decl. at ¶ 2.

<sup>7</sup> *Id.* at ¶ 3.

<sup>27</sup> Id. at ¶ 5.  
<sup>8</sup> Id. at ¶ 11-12

1 Beginning with the payment due November 1, 2011, Borrowers failed to perform monthly  
 2 payment obligations and defaulted under the Loan.<sup>9</sup> A Notice of Default was sent to the  
 3 Borrowers on or about May 10, 2012,<sup>10</sup> but Borrowers failed to cure the default. A Notice of  
 4 Trustee's Sale, setting a sale date of August 29, 2014, was recorded April 30, 2014 as Instrument  
 5 No. 4389907.<sup>11</sup>

6 On or around Oct. 7, 2014 Plaintiff James A. Bigelow ("Plaintiff") filed a "Verified  
 7 Complaint"<sup>12</sup> against Defendants Green Tree and MERS alleging: (1) violation of the Fair Debt  
 8 Collection Practices Act ("FDCPA"); (2) violation of the Washington Deeds of Trust Act  
 9 ("DTA"); and (3) violation of the Washington Consumer Protection Act ("CPA") (hereinafter  
 10 referenced as the "Complaint").<sup>13</sup> Plaintiff also filed an ex parte motion for a Temporary  
 11 Restraining Order ("TRO") to stop a scheduled foreclosure sale.<sup>14</sup> Plaintiff's TRO was denied  
 12 October 7, 2014.<sup>15</sup> Defendants respectfully requests this Court take judicial notice of all  
 13 documents filed by Plaintiff under penalty of perjury.

14 On Nov. 13, 2014 Plaintiff filed an "Amended Verified Complaint" in which Plaintiff made  
 15 essentially the same allegations against the same parties. Defendants filed a Motion to Dismiss  
 16 Plaintiff's Amended Complaint ("First Dismissal Motion") on December 2, 2014<sup>16</sup> Defendants  
 17 respectfully requests this Court take judicial notice of all documents filed by Defendants in this  
 18 case to date. Defendants First Dismissal Motion was granted with leave to amend,<sup>17</sup> and plaintiff  
 19 was ordered to join Carolyn Bigelow to the litigation.<sup>18</sup> Dkt. 35 at ¶ 2.

20  
 21 \_\_\_\_\_  
 22 <sup>9</sup> Id. at ¶ 7.

23 <sup>10</sup> RJD at ¶ 4, Ex. 4

24 <sup>11</sup> RJD at ¶ 5, Ex. 5.

25 <sup>12</sup> In his Complaint, Plaintiff clearly and plainly admits to executing the Note at issue. See Docket No. 1 at ¶ 11. Later  
 26 versions of Plaintiff's Complaint state he "allegedly" executed the Note. See, Docket Nos. 11 and 44.

27 <sup>13</sup> Docket No. 1.

<sup>14</sup> Docket No. 2.

<sup>15</sup> Docket No. 3.

<sup>16</sup> Docket Nos. 15-17.

<sup>17</sup> Docket No. 35.

<sup>18</sup> Docket 35 at 2.

1 Without joining Carolyn Bigelow to the litigation **in defiance of this Court's order to do**  
 2 **so**, Plaintiff filed a Second Amended Complaint on February 23, 2015<sup>19</sup> (hereinafter "SAC"), in  
 3 which Plaintiff alleged against Defendants: (1) Violation of the FDCPA; (2) Violation of the CPA;  
 4 (3) Slander of Title; and (4) Infliction of Emotional Distress. In this complaint Plaintiff also added  
 5 Defendants' attorney of record and her law firm as defendants in the litigation based on the sole  
 6 allegation that "Parker filed her own version of an alleged Promissory Note," that "Parker never  
 7 had possession of Plaintiff's alleged original Note" and that there was no "stamp affixed to it from  
 8 TTC certifying this Note to be a copy of the original Note."<sup>20</sup>

9 Defendants filed its Motion to Dismiss Plaintiff's Second Amended Complaint ("Second  
 10 Dismissal Motion") March 20, 2015.<sup>21</sup> The Second Dismissal Motion was granted in part and  
 11 denied in part; the CPA and IIED claims survived as to all Defendants, and the additional FDCPA  
 12 claim also remained as to Green Tree.<sup>22</sup>

13 WFZ and Parker also successfully moved to strike plaintiff's SAC for Anti-SLAPP  
 14 Violations ("Anti-SLAPP Motion").<sup>23</sup> However, plaintiff sought reconsideration based on case  
 15 law, available to him prior, involving actions with a jury trial, and the order granting the Anti-  
 16 SLAPP motion was vacated.<sup>24</sup> In addition, plaintiff has consistently refused to cooperate with  
 17 Defendants' discovery attempts - including repeated non-appearances for depositions scheduled by  
 18 Defendants, and filing excessive motions.<sup>25</sup>

### 19 III. EVIDENCE RELIED UPON

20 This Motion is based upon the records and pleadings filed herein, the Request for Judicial  
 21 Notice and the Declarations of Green Tree and Renee M. Parker, together with the exhibits  
 22 attached thereto filed with this Motion.

23 \_\_\_\_\_  
 24<sup>19</sup> Docket 44.

25<sup>20</sup> Docket 44 at ¶¶ 165-66, 169-70.

<sup>21</sup> Docket 65-66.

<sup>22</sup> Docket 92.

<sup>23</sup> Docket 60.

<sup>24</sup> Docket 105.

<sup>25</sup> Defendants' Motion for Terminating Sanctions is still pending before this Court. Docket No. 124, 127, 129.

#### IV. ISSUE PRESENTED

Whether summary judgment is appropriate where, as here, there are no disputed material facts and the Defendants are entitled to judgment as a matter of law.

## V. AUTHORITY AND ARGUMENT

#### **A. STANDARD OF REVIEW ON SUMMARY JUDGMENT**

6 Summary judgment is appropriate where the “the movant shows that there is no genuine  
7 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FRCP  
8 56(a). A fact is material if it may affect the outcome of litigation. *Anderson v. Liberty Lobby, Inc.*,  
9 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Summary judgment is available in  
10 one of two ways: the moving party may “(1) set out its version of the facts and allege that there is  
11 no genuine issue based on those facts; or (2) point out to the court that the nonmoving party lacks  
12 sufficient evidence to support its case.” *Seybold v. Neu*, 105 Wash. App. 666, 677, 19 P.3d 1068  
13 (2001) (citations omitted) (cited with approval in *Fiedler v. VA*, No. C06-5708 RBL, 2008 U.S.  
14 Dist. LEXIS 4048, at \*4-5, 2008 WL 80236 (W.D. Wash. Jan. 7, 2008) (“summary judgment  
15 should be granted where the non-moving party fails to offer evidence from which a reasonable jury  
16 could return a verdict in its favor.”)).

17       Once a moving party meets its burden to show there is no genuine issue as to any material  
18 fact, the nonmoving party must set forth specific facts rebutting the moving party's contention and  
19 disclosing that a genuine issue of material fact exists. *Liberty Lobby*, 477 U.S. at 256 ("The movant  
20 has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby  
21 relieved of his own burden of producing in turn evidence that would support a jury verdict. Rule  
22 56(e) itself provides that a party opposing a properly supported motion for summary judgment may  
23 not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing  
24 that there is a genuine issue for trial."). If the nonmoving party "fails to make a showing sufficient  
25 to establish the existence of an element essential to that party's case" summary judgment should be  
26 granted. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed.2d 265 (1986).  
27 "Under Washington law, statements of ultimate facts, conclusions of fact, and conclusory

1 statements of fact are insufficient for summary judgment purposes.” *Ballen v. City of Redmond*,  
 2 466 F.3d 736, 745 (9th Cir. 2006) (citing *Grimm v. Univ. of Puget Sound*, 110 Wn.2d 355, 753  
 3 P.2d 355 (1988)).

4 **PLAINTIFF FAILED TO EXHAUST THE ADMINISTRATIVE CLAIMS PROCESS OF**  
**FIRREA AND IS BARRED FROM ADJUDICATING HIS CLAIM HERE**

5 Plaintiff failed-to comply with congressionally mandated administrative claims process  
 6 because Plaintiff’s claims are explicitly premised on and related to the assets of the original lender,  
 7 Pierce Commercial Bank. The Financial Institutions Reform, Recovery, and Enforcement Act of  
 8 1989 (“FIRREA”) requires that any claims (i) relating to any act or omission of a failed bank or the  
 9 FDIC, or (ii) for payments from, or a determination of rights with respect to the assets of a failed  
 10 bank or the FDIC be brought through FIRREA’s administrative claims process before any court  
 11 can obtain subject matter jurisdiction over those claims. 12 U.S.C. § 1821(d)(13)(D). The Ninth  
 12 Circuit has consistently held that the failure to exhaust FIRREA’s administrative claims process is  
 13 a bar to jurisdiction: “Section 1821(d)(13)(D) strips all courts of jurisdiction over claims made  
 14 outside the administrative procedures of section 1821.” *Henderson v. Bank of New England*, 986 F.  
 15 2d 319, 320 (9th Cir. 1993); *McCarthy v. FDIC*, 348 F.3d 1075, 1081 (9th Cir. 2004) (Claimants  
 16 “must exhaust administrative requirements of § 1821(d), no jurisdiction exists over its action.”)

17 Here, plaintiff’s claims focus in part on the acts and omissions of Pierce Commercial Bank.  
 18 For example, Plaintiff alleges that “[p]ursuant to the alleged Note, any provision that requires  
 19 action of the [lender] requires the action of PCB [Pierce Commercial Bank] and not the note  
 20 holder....PCB is and always will be the [only] entity that the Plaintiff has borrowed money  
 21 from.”<sup>26</sup> “At no time relevant has the true and lawful owner ever declared Plaintiff to be in  
 22 default.”<sup>27</sup> Thus, Plaintiff’s claims are barred by 12 U.S.C. §1821(d)(13)(D)(ii) absent exhaustion  
 23 of FIRREA’s administrative remedies.

24 Plaintiff also cannot avoid the requirements of FIRREA by stating claims solely against  
 25 Green Tree or MERS because courts have also held that the plain language of FIRREA broadly

26 Docket No. 44 at ¶ 30

27 Id. at ¶ 110.

1 applies to: (a) “any claim relating to any act” of the failed bank or the FDIC as receiver, even if the  
 2 FDIC and the failed bank are not named as defendants; and (b) any “action seeking a determination  
 3 of rights with respect to the assets of any depository institution for which the Corporation has been  
 4 appointed receiver,” even if the assets are no longer in the possession of the FDIC, which is the  
 5 case here. 12 U.S.C. § 1821(d)(13)(D); *See Village of Oakwood v. State Bank and Trust Co.*, 539  
 6 F.3d 373, 386 (6th Cir. 2008) (holding that claims against purchaser of failed bank assets from  
 7 FDIC were barred by 12 U.S.C. § 1821(d)(13)(D)(ii) as “directly related to or omissions of the  
 8 FDIC as the receiver of [the failed bank]”); *Am. First Fed, Inc. v. Lake Forest Park, Inc.*, 198 F.3d  
 9 1259, 1263 n.3 (11th Cir. 1999) (“AFF, having purchased the note from the RTC, stands in the  
 10 shoes of the RTC and acquires its protected status under FIRREA. Thus, if Lake Forest is barred  
 11 [by Section 1821(d)] from asserting this claim against the RTC, it is similarly barred from  
 12 asserting it against AFF.”). As is the case here, in *Benson v. JPMorgan Chase Bank, NA.*, 673  
 13 F.3d 1207, 1214 (9th Cir. 2012), the Court held FIRREA’s jurisdictional bar applies to claims  
 14 asserted against a purchasing bank when the claim is based on the conduct of the failed institution.

15 Here, Plaintiff’s claims are governed by FIRREA. Regardless of whom Plaintiff names as a  
 16 defendant, his claims relate to alleged acts and omissions of the original lender, a failed bank; thus,  
 17 since Plaintiff never participated in FIRREA’s administrative claims process, this court lacks  
 18 jurisdiction over these claims.

19 **C. PLAINTIFF FAILED TO JOIN A NECESSARY PARTY DESPITE A COURT ORDER**  
 20 **TO DO SO, AND PLAINTIFF IS UNABLE TO JOIN THE PARTY NOW**

21 Despite an Order from this Court entered on January 29, 2015<sup>28</sup> Plaintiff failed to join  
 22 Carolyn Bigelow to this litigation,<sup>29</sup> and the deadline passed on April 21, 2016.<sup>30</sup> FRCP 19(a)(1)  
 23 requires a person be joined to the litigation if:

24 in that person’s absence, the court cannot accord complete relief  
 25 among existing parties; or (B) that person claims an interest

26 <sup>28</sup> Docket No. 35 at ¶ 2.

27 <sup>29</sup> See, e.g., Docket No. 92 at 9 (“The only showing that has been made is Bigelow’s refusal to follow an explicit Court  
 28 order, which carries its own remedies.”).

<sup>30</sup> Docket No. 115

relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

If a person has not been joined, the court shall order that the person be made a party either as a plaintiff, a defendant, or an involuntary plaintiff. FRCP 19(a)(2). In order to dismiss for failure to join a necessary party, the Court must find that the party is indispensable, the party may not be joined, and the case cannot proceed “in equity and good conscience” without that party. *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 779-80 (9th Cir. 2005). Litigation may be dismissed where an indispensable party cannot be joined. FRCP 12(b)(7).

11 First, Carolyn Bigelow is indispensable because: (1) James Bigelow and Carolyn Bigelow  
12 are co-obligors under the Note and Deed of Trust, (2) Carolyn Bigelow specifically retained a one-  
13 half interest in the Subject Property in the dissolution of her marriage from James Bigelow, and (3)  
14 Carolyn Bigelow sought to prohibit James Bigelow from taking any action with respect to the  
15 Subject Property without the express, written (and notarized) consent of both Carolyn and James  
16 Bigelow.<sup>31</sup>

17       Second, any decision of this Court in favor of Plaintiff would unfairly dispose of an action  
18 in the absence of Carolyn Bigelow, who is contractually entitled to any profit and/or contractually  
19 obligated to pay 50% of all fees related to foreclosure.<sup>32</sup>

20       Third, this Court ordered Plaintiff to join Carolyn Bigelow to the present litigation, and  
21 Plaintiff was allowed to amend the Complaint with the specific purpose of joining her.<sup>33</sup> Plaintiff  
22 attempted to avoid compliance with the order by filing his “Note to the Court,”<sup>34</sup> wherein Plaintiff  
23 glibly explains his inability’ to join Carolyn Bigelow due to their divorce, without further

<sup>31</sup> See RJD at ¶ 6(a) Ex. 6-A, 6-D at ¶¶ 3.2, 3.3 3.4, and 3.5

<sup>32</sup> See RJN Ex. 6-D in which both Carolyn and James Bigelow retained the right to claim 50% proceeds from sale of the Subject Property, or in the alternative, each retained 50% liability for any fees related to foreclosure.

<sup>33</sup> Docket No. 35 at 5-6.

<sup>34</sup> Docket No. 47.

1 explanation (and with knowledge that Carolyn Bigelow expressly retained her right to be involved  
 2 with monetary disposition of the Subject Property).<sup>35</sup>

3 Fourth, Carolyn Bigelow has an interest in this litigation, and “resolving the action in [her]  
 4 absence may leave [Defendants] subject to inconsistent obligations because of that interest.” *Salt*  
 5 *River Project Agr. Imp. And Power Dist. V. Lee*, 672 F.3d 1176, 1179 (9th Cir. 2014). A ruling in  
 6 this case, without inclusion of Carolyn Bigelow, leaves Defendants “subject to a substantial risk of  
 7 incurring double, multiple, or otherwise inconsistent obligations” by proceeding without her. *Id.*;  
 8 *see also* FRCP 19(a)(1)(B)(ii).

9 The deadline to add Carolyn Bigelow passed on April 21, 2016.<sup>36</sup> Plaintiff had an entire  
 10 year to add Carolyn Bigelow before this deadline, but explicitly refused to do so.<sup>37</sup> Accordingly,  
 11 Plaintiff’s case must be dismissed with prejudice due to Plaintiff’s failure, and blatant refusal, to  
 12 join Carolyn Bigelow as a party to this action as ordered.

### 13 C. PLAINTIFF’S “PER SE CONSUMER PROTECTION ACT” CLAIM FAILS

14 In support of the alleged “per se” CPA violation Plaintiff offers only the following  
 15 rationale: (1) MERS was a named beneficiary on the Deed of Trust, which rendered the document  
 16 unenforceable in its entirety SAC ¶¶ 19-20, 43-44, 50, 78-79; (2) MERS is not a party to the Note  
 17 SAC ¶ 19; and (3) the Note does not bear dated endorsements SAC ¶¶ 33. Plaintiff claims these  
 18 issues alone caused all other documents executed at a later time to be invalid. SAC ¶¶ 55, 108.

19 The “purpose of the Consumer Protection Act [is] to protect the public from acts or  
 20 practices which are injurious to consumers and not to provide an additional remedy for private  
 21 wrongs which do not affect the public generally.” *Lightfoot v. Macdonald*, 86 Wash. 2d 331, 333,  
 22 544 P.2d 88 (1976). “Acts performed in good faith under an arguable interpretation of existing law  
 23 do not constitute unfair conduct violative of the consumer protection law.” *Perry v. Island Sav. &*  
 24 *Loan Ass’n*, 101 Wash. 2d 795, 810, 684 P.2d 1281 (1984).

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25  
 26<sup>35</sup> RJD at ¶ 6, Ex. 6.  
 26<sup>36</sup> Docket No. 115.  
 27<sup>37</sup> Docket No. 47.

1       **1. Plaintiff's CPA Claim is Barred by the Statute of Limitations.**

2       Plaintiff's CPA claim is barred by a four-year limitations period. RCW 19.86.120 ("Any  
 3 action to enforce a claim for damages under RCW 19.86.090 shall be forever barred unless  
 4 commenced within four years after the cause of action accrues."). Because Plaintiff's claim stems  
 5 from inclusion of MERS on the Deed of Trust, the statute of limitations on his CPA claim began to  
 6 accrue when the Deed of Trust was executed; not when foreclosure is commenced. *Cf. Wescott v.*  
 7 *Wells Fargo Bank, N.A.*, 862 F.Supp.2d 1111, 1118 (W.D. Wash. 2012) ("Plaintiff's CPA claim  
 8 accrued on or before December 27, 2006, when the loan transaction closed.") In *Zhong v. Quality*  
 9 *Loan Svc. Corp. of Washington*, the court rejected a borrower's claim she did not learn of the  
 10 alleged misrepresentations (such as listing MERS as a beneficiary) until foreclosure was initiated..  
 11 No. C13-0814-JLR, 2013 U.S. Dist. LEXIS 145916, 2013 WL 5530583, \*4 (W.D. Wash. October  
 12 7, 2013) (citing and *Green v. A.P.C.*, 136 Wash.2d 87, 960 P.2d 912, 915 (1998)). Rather, the court  
 13 reasoned the borrower could have learned of these facts at any time simply by reading her loan  
 14 papers. *Id.* This case is identical as Bigelow has had ample opportunity to read his loan papers  
 15 and to bring the action within the statutory time frame. Failing such a simple task, his claims fail.

16       **2. Plaintiff's "Per Se" Claims Fail on their merits.**

17       Plaintiff improperly claims that Defendants violated the CPA based on unfounded and  
 18 unsupported allegations that Defendants committed a "per se violation" of the statute. SAC ¶ 221.  
 19 Plaintiff makes three vague statements to support this contention:

20       1) "It is impossible to frame definitions which embrace all unfair practices. There is  
 21 no limit to human inventiveness in this field. Even if all known unfair practices  
 22 were specifically defined and prohibited, it would be at once necessary to begin all  
 23 over again. If congress were to adopt the method of definition it would undertake an  
 24 endless task. It is also practically impossible to define unfair practices so that the  
 25 definition will fit business of every sort in every part of this country." SAC, ¶ 220;

26       2) Violation occurred "through misrepresentations, fraud, and/or irregularities in the  
 27 nonjudicial foreclosure proceedings, restricting and inhibiting Plaintiff's ability to  
 locate the party accountable and with authority to correct the foreclosure  
 irregularities, and pursuing a course of conduct that involves the preparation of false  
 and misleading documents and actions and relying upon such documents and/or

1 actions that they knew or should have known to be false, misleading and that had  
 2 the capacity to deceive a substantial portion of the public.” SAC, ¶ 222; and

3) Defendants “engaged in these unfair and deceptive practices as part of a normal  
 3 course of business and commerce. Such practices are likely to be repeated, affecting  
 4 the citizens of the State of Washington” SAC, ¶ 223.

5 None of these claims have merit. To establish a “per se” violation of the CPA, Plaintiff must  
 6 prove: “(1) the existence of a *pertinent statute*; (2) its violation; (3) that such violation was the  
 7 proximate cause of damages sustained; and (4) that they were within the class of people the  
 8 statute sought to protect.” *Dempsey v. Joe Pignataro Chevrolet, Inc.*, 22 Wn. App. 384, 393, 589  
 9 P.2d 1265 (1979) (emphasis added). Only the Washington Legislature can establish a *per se* CPA  
 10 violation, and it can do so only by making a specific legislative declaration to that effect.  
 11 *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778, 787-791, 719  
 12 P.2d 531 (1986). (“it has become clear that the Legislature, not this court, is the appropriate body  
 13 to establish … a per se unfair trade practice”).

14 Plaintiff failed to allege the existence of, or an actual violation of any statute that  
 15 constitutes a per se violation of the CPA; As to Defendants Plaintiff circuitously references “§  
 16 19.86 *et seq.*” as the statute Defendants are alleged to have violated SAC, ¶¶ 1, 222. Plaintiff  
 17 cannot create a per se CPA claim by merely (and ambiguously) citing violation of the statute that  
 18 promulgates and defines a CPA claim, and support this contention by merely reciting the facts of  
 19 a foreclosure process. He was required to plead something more.

20 Moreover, Plaintiff is required to show a causal link between an alleged violation of the  
 21 CPA and the injury suffered. *See, Schmidt v. Cornerstone Invest., Inc.*, 115 Wash. 2d 148, 167,  
 22 795 P.2d 1143 (1990). “[T]he term ‘proximate cause’ means a cause which in direct sequence  
 23 unbroken by any superseding cause, produces the injury [or] event complained of and without  
 24 which such injury [or] event would not have happened.” *Schnall v. AT&T Wireless Servs., Inc.*,  
 25 171 Wash.2d 260, 278, 259 P.3d 129 (2011) (quoting 6 Wash. Practice: Washington Pattern Jury  
 26 Instructions; Civil 15.01 at 181 (5th ed.2005). To show the causal link, Plaintiff is required to  
 27

1 prove that but-for Defendants' actions Plaintiff would not have suffered any injury. *Indoor*  
 2 *Billboard v. Integra Telecom*, 162 Wash.2d 59, 84 (2007). Without demonstration of direct harm a  
 3 CPA claim fails. *Frias v. Asset Foreclosure Svcs., Inc.*, 957 F. Supp. 2d 1264, 1270 (W.D. Wash.  
 4 2013), See also *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wash. 2d 907, 917, 32 P.3d 250 (2001).

5 **Plaintiff's only injuries stem from the Borrowers' abject failure to tender monthly**  
 6 **installment payments, and nothing more. This is not injury that can be attributed to**  
 7 **Defendants.** Plaintiff does not and cannot prove any existence of confusion over the party to  
 8 whom loan payments were to be paid such that default would occur, and in fact Exhibits C, E, G,  
 9 I, K, L, and M to the SAC demonstrate Plaintiff was consistently instructed as to both ownership  
 10 of the Loan *and* where payments were to be sent. Plaintiff does not show he tendered payments to  
 11 Green Tree or to any other entity that were not credited,<sup>38</sup> and does not provide evidence that  
 12 another party has claimed any right to payment on the Loan or initiated foreclosure. In fact,  
 13 Plaintiff filed documents in the Superior Court of Snohomish County affirming Plaintiff's  
 14 knowledge that Green Tree had the right to enforce the Note and Deed of Trust as owner of the  
 15 Loan, and also that Plaintiff knew the Subject Property was in danger of foreclosure.<sup>39</sup> Plaintiff  
 16 also cannot show that MERS caused injury.

17 I can't find any but-for causal relationship between what MERS did and didn't do  
 18 and the harm that wasn't suffered. Because even if the filing of foreclosure actions  
 19 is an injury, and I don't think the showing has been made that there was any injury  
 20 here,<sup>40</sup> I'll point out that it's also clear that MERS didn't initiate those foreclosure  
 21 proceedings, lend money, make representations to plaintiff, send plaintiff any  
 22 default notice or initiate the foreclosure. MERS may have greased the wheels for  
 23 other people, but I don't think that is enough for causation to injury ... if you can't  
 24 make the showing under prong four injury, it's impossible to make the showing  
 25 under prong five causation.

26 *Bain v. Metropolitan Mortg. Grp., Inc.*, 2013 WL 6193887, \*6 (Wash. Super. Ct. 2013). See also,

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27 <sup>38</sup> Plaintiff claims he tendered payments to Green Tree, SAC, ¶ 145, but the record shows Plaintiff never did. Docket  
 28 No. 92 at ¶ 29 ("It is undisputed that Bigelow failed to make his November 1, 2011 payment).

29 <sup>39</sup> See RJD at ¶ 6, Ex. 6-C at ¶ 2.10 ("The parties have the following community liabilities: Creditor Green Tree  
 30 Services, Amount \$233,899.00"); Ex. 6-D at ¶ 3.5 ("Responsible for modification of 1st mortgage and the payments  
 31 100% ... If we are foreclosed on I am responsible for 1/2 of any fee's [sic].")

32 <sup>40</sup> This Court held that Plaintiff did not suffer any injury arising from acts related to foreclosure. Dkt. 92 at Pg. 8.

1 *Hangman Ridge*, 105 Wash. 2d at 780 (Plaintiffs must demonstrate that MERS took some unfair  
 2 or deceptive act in trade or commerce that caused an identifiable injury).

3 In addition, Plaintiff cannot establish a per se claim because he failed to show Defendants  
 4 engaged in deceptive conduct. MERS made no misrepresentations or misstatements to Plaintiff or  
 5 Carolyn Bigelow. To the contrary, MERS fully described its role to the Borrowers through the  
 6 very contract documents they signed. MERS did not engage in any conduct that was unfair,  
 7 deceptive or misleading. Everything was fully disclosed and agreed to by the Borrowers. Even if,  
 8 *arguendo*, the Court ruled that MERS incorrectly concluded that it was a legal beneficiary under  
 9 Washington deeds of trust, MERS fully disclosed its role to James and Carolyn Bigelow and did  
 10 not affirmatively misrepresent or knowingly misstate anything to them.

11 To the extent Plaintiff alleges the per se violation may stem from fraud, the SAC does not  
 12 plead *any* act of fraud with particularity, and does not name the parties that committed each  
 13 alleged act along with how and when each act was committed. *See, In re GlenFed, Inc. Sec.*  
 14 *Litigation*, 42 F.3d 1541, 1547 n.7 (9th Cir. 1994). “Under Washington law, a plaintiff claiming  
 15 fraud must establish a number of elements, and must plead the fraud claim with particularity. A  
 16 plaintiff alleging negligent misrepresentation must similarly prove falsity, as well as reasonable  
 17 reliance, causation, and damages, by clear, cogent, and convincing evidence.” *McAfee v. Select*  
 18 *Portfolio Servicing, Inc.*, ---Wn. App.---, 2016 Wash. App. LEXIS 392, at \*13 (Mar. 7, 2016)  
 19 (internal citations omitted). To the extent Plaintiff lumped the defendants together in alleging  
 20 fraud, Plaintiff was also required to differentiate and inform each defendant of their role in  
 21 committing the act. *Swartz v. KPMG LLP*, 476 F.3d 756, 765-765 (9th Cir. 2007).

22 The CPA is not designed to protect borrowers who fail to perform under the terms of the  
 23 Note and Deed of Trust from any and all foreclosure, without more. Plaintiff willfully failed to  
 24 tender payments on the Loan for several years, and foreclosure of the Subject Property would be  
 25 the expected outcome of this failure to pay. As a result this claim fails.

26 //

27 //

### 3. Plaintiff's "Consumer Protection Act" Claim Fails

### *a. The Assignment was a valid Instrument*

Plaintiff cannot prove the required elements to survive summary judgment on his CPA claim. “To successfully bring an action under the CPA, a plaintiff must prove five elements: ‘(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; [and] (5) causation.’” *Johnson v. Camp Auto., Inc.*, 148 Wn. App. 181, 185, 199 P.3d 491 (2009). “The failure to establish any of the elements is fatal to a CPA claim.” *Schnall*, 171 Wash.2d at 278 (citing *Holiday Resort Cnty. Ass’n v. Echo Lake Assocs., LLC*, 134 Wn. App. 210, 226 (2006)).

Plaintiff alleges MERS' execution of the Assignment creates an actionable CPA injury due to recordation of fraudulent documents in public record.<sup>41</sup> This argument fails for five reasons. First, the Assignment in this case is not deceptive because MERS was acting at the direction of the noteholder, and Green Tree was in actual possession of the Note when the Assignment was executed.<sup>42</sup> *Cf. Massey v. BAC Home Loans Servicing LP*, NO. C12-1314JLR, 2013 U.S. Dist. LEXIS 180472, 2013 WL 6825309 (W.D. Wash. 2013); *Estribor v. Mountain States Mortgage*, No. C13-5297 BHS, 2013 WL 6499535 at \*3, 2013 U.S. Dist. LEXIS 174312 (W.D. Wash. Dec. 11, 2013) (“there is no standard set out in *Bain* for an action against MERS when MERS is acting as a nominee. In the absence of a case directly on point or *per se* violation of a statute, [plaintiff] bears the burden of showing an unfair or deceptive act. On this issue, the Court is not convinced that MERS's assignment of the Deed of Trust was unfair, deceptive, or in violation of public interest.”).

Second, unlike the assignment at issue in *Bain*—which suggested MERS was acting as beneficiary in its own right, rather than as a limited agent for a principal, *see* 175 Wash. 2d at 116-17, the assignment in this case disclosed that MERS was acting as an agent for a principal.

Third, Plaintiff's Deed of Trust contains the following provision:

<sup>41</sup> SAC, ¶ 42-44, 46-57

<sup>42</sup> Green Tree Declaration, ¶ 10

1           “Borrower understands and agrees that MERS holds only legal title  
 2           to the interests granted by Borrower in this Security Instrument, but,  
 3           if necessary to comply with law or custom, MERS (as nominee for  
 4           Lender and Lender’s successors and assigns) has the right: to  
 5           exercise any or all of those interests, including, but not limited to,  
 6           the right to foreclose and sell the Property; and to take any action  
 7           required of Lender including, but not limited to, releasing and  
 8           cancelling this Security Instrument.”<sup>43</sup>.

9  
 10          See *Estribor*, 2013 U.S. Dist. LEXIS 174312 at \*8 (“The Deed of Trust clearly states MERS is a  
 11          nominee for the lender and lender’s successors and assigns. It is unclear how actions within that  
 12          capacity are unfair or deceptive.”). This means that MERS had authority under the Deed of Trust  
 13          to execute the Assignment—with Plaintiff’s express agreement.

14  
 15          Fourth, the Assignment is only a formality and recordation of an Assignment is not  
 16          necessary or sufficient to confer standing to foreclose; the security follows the Note, not the other  
 17          way around. *Fidelity & Dep. Co. v. Ticor Title Ins.*, 88 Wn. App. 64, 68, 943 P.2d 710 (1997); *see also*,  
 18          *Carpenter v. Longan*, 83 U.S. 271, 275, 21 L. Ed. 313 (1872). “[T]he fact that MERS is  
 19          listed as a beneficiary of the deed of trust is not relevant to the outcome of this case...by virtue of  
 20          being in possession of the note, U.S. Bank is the lawful owner. Its right to receive payment on the  
 21          note does not depend upon any assignment of the note.” *Upkoma v. U.S. Bank Nat. Ass’n*, No: 12-  
 22          CV-0184-TOR, 2013 WL 1934172 at \*3 (E.D. Wash, May 9, 2013).

23  
 24          Fifth, transfer of the Note also transferred the security interest, and an assignment is not  
 25          even necessary to establish Green Tree’s status as beneficiary. *Cf. Stoebuck & Weaver*, § 18.20  
 26          at 340 (“From these basic principles, it follows that a transfer of the obligation [here, the Note],  
 27          by assignment, negotiation, transfer, or whatever form of transfer is sufficient to transfer it, should  
 28          carry the mortgage along with it. This is indeed the universal result in American law.”); *see also*  
 29          *Fidelity & Deposit v. Ticor*, 88 Wn. App. 64, 68-69, 943 P.2d 710 (1997); *Price v. N. Bond &*  
 30          *Mortg. Co.*, 161 Wash. 690, 695, 297 P. 786 (1931). Defendant Green Tree was in possession of  
 31          the “bearer” Note when the Assignment was executed, its Notice of Default was issued, and when

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43 RJN at ¶ 1, Ex. 1 at 3, ¶ 1.

1 the Notice of Trustee's Sale was recorded.<sup>44</sup> Thus, Green Tree was the legal beneficiary  
 2 notwithstanding the Assignment, and at all times relevant to this case was empowered to enforce  
 3 the Note through foreclosure.

4 *b. MERS is empowered to act as the Lender's agent.*

5 In addition, MERS can act as an agent for the holder of a note. *Bain*, 175 Wn.2d at 106.  
 6 An agent can execute an Assignment when it is within its scope of duties. *Id.* "MERS was  
 7 authorized as the lender's nominee to assign the deed to Wells Fargo, which held the note.  
 8 Following that assignment, beneficiary Wells Fargo, not MERS, appointed a successor trustee.  
 9 These transactions complied with the terms of RCW 61.24.010(2) and the deed of trust." *Id.* A  
 10 "nominee is one who holds bare legal title to property for the benefit of another." *Fourth Inv. LP*  
 11 *v. United States*, 720 F.3d 1058, 1066 (9th Cir. 2013). Washington courts have approved of the  
 12 role of a nominee for over a century. *E.g. McAfee v. Select Portfolio Servicing, Inc.*, ---Wn. App.--  
 13 -, 2016 Wash. App. LEXIS 392, at \*13 (Mar. 7, 2016) , *Anderson Buick Co. v. Cook*, 7 Wn.2d  
 14 632, 641-42, 110 P.2d 857 (1941) (mortgage valid even where mortgagee "held bare legal title"  
 15 for real property in interest); *Carr v. Cohn*, 44 Wash. 586, 588, 87 P. 926 (1906) (nominee can  
 16 bring quiet title action on deed).

17 When the beneficial ownership in a mortgage loan is sold from one MERS® System  
 18 member to another, MERS automatically becomes nominee (agent) for the new note owner in  
 19 regards to a deed of trust. The status of MERS' role as nominee/agent for the then current note  
 20 owner is not affected by the status of the original lender named in the MERS deed of trust, MERS  
 21 remains the beneficiary of record on the deed of trust and continues to act as nominee for the new  
 22 beneficial owner, regardless of whether the prior owner was no longer in business. *See, Kiah v.*  
 23 *Aurora Loan Serv., LLC*, No. 10-40161-FDS, 2010 U.S. Dist. LEXIS 121252 \*12, 2010 WL  
 24 4781849 (D. Mass. Nov. 16, 2010) ("dissolution of [lender] would not and could not prevent  
 25 [noteholder] from obtaining an assignment of the mortgage from MERS, both as a matter of law

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26  
 27 <sup>44</sup> Green Tree Decl. at ¶ 10.

1 and according to the arrangement that existed between MERS and [noteholder] as a ‘successor  
 2 and assign’’). *See also*, Restatement (Third) Property § 5.4 cmt. E (“Courts should be vigorous in  
 3 seeking to find such [agency] relationship”).

4 MERS was the nominee for Pierce Commercial Bank and its successors and/or assigns in  
 5 interest, and had a limited agency relationship. Plaintiff’s Deed of Trust contained a provision  
 6 allowing MERS to act on behalf of Pierce Commercial Bank and any successors to Pierce  
 7 Commercial Bank.<sup>45</sup>. Here the execution of the Assignment was within the scope of MERS’  
 8 duties pursuant to the Deed of Trust executed by the Borrowers.

9                   C. *Green Tree can be a noteholder if Fannie Mae is the owner of the loan.*

10 Plaintiff essentially claims that ownership of the Note by Fannie Mae vitiates any acts that were  
 11 taken by Green Tree. See SAC, ¶¶ 119, 131 142, 156, 158. Case law has consistently held that the  
 12 holder and owner need not be the same party: *Cf. Cameron v. Acceptance Capital Mortg. Corp.*,  
 13 No. C13-1707 RSM, 2013 U.S. Dist. LEXIS 151134, 2013 WL 5664706 (W.D. Wash. 2013)  
 14 (“Flagstar [the lender] derived its appointment authority as the *holder* of the endorsed Note, a  
 15 position that is not undermined by the fact that Fannie Mae also had an ownership interest in the  
 16 Note at the time the appointment was made ... ‘even if Fannie Mae has an interest in Plaintiffs’  
 17 loan, Flagstar has the authority to enforce’ the indorsed Note that it held in its possession.”); *see also Coble v. SunTrust Mortgage Inc.*, No. C13-1878-JCC, 2014 U.S. Dist. LEXIS 23921 at \*10  
 18 (W.D. Wash. Feb. 18, 2014) (“Plaintiff also suggests that the holder of the note must be the owner  
 19 of the obligation-but this argument has been rejected by courts”); *Massey v. BAC Home Loans*  
 20 *Servicing LP*, No. 12-cv-1314-JLR, 2013 U.S. Dist. LEXIS 180472, 2013 WL 6825309 at \*5  
 21 (W.D. Wash. Dec.23, 2013) (citing cases); *Rouse v. Walls Fargo Bank, N.A.*, No. 13-cv-5706-  
 22 RBL, 2013 U.S. Dist. LEXIS 144013, 2013 WL 5488817 at \*5 (W.D. Wash. Oct. 2, 2013)  
 23 (“[C]ourts have uniformly rejected claims that only the ‘owner’ of the note may enforce it.”)).

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<sup>45</sup> RJN at ¶ 1, Ex. 1 at 3.

1                   *D. The original note is bearer paper and Green Tree was the holder.*

2                   Plaintiff's Complaint alleges violation of the FDCPA and CPA because Green Tree could  
 3 not hold or enforce the Note.<sup>46</sup> First, case law already established that a fundamental issue is  
 4 whether the party initiating foreclosure is the holder of the Note or an agent thereof. *See Bain*,  
 5 175 Wn.2d at 89 ("The plaintiffs argue that our interpretation of the deed of trust act should be  
 6 guided by these UCC definitions and thus a beneficiary must either actually possess the  
 7 promissory note or be the payee...We agree."). When a negotiable instrument is indorsed in  
 8 blank, it "becomes payable to bearer and may be negotiated by transfer of possession alone ...."  
 9 RCW 62A.3-205(b). RCW § 62A.1-201(20) defines a holder as being "the person in possession  
 10 if the instrument is payable to bearer or, in the case of an instrument payable to an identified  
 11 person, if the identified person is in possession." See also RCW 62A.1-201(5). Pursuant to RCW  
 12 62A.3-301 the "Person entitled to enforce" an instrument means (i) the holder of the instrument .."  
 13 A person may be a person entitled to enforce the instrument even though the person is not the  
 14 owner of the instrument or is in wrongful possession of the instrument." RCW § 62A.1-201(20)  
 15 defines a holder as being "the person in possession if the instrument is payable to bearer ...."

16                   The Note is endorsed in blank.<sup>47</sup> Green Tree was in possession of the Note, was entitled  
 17 to enforce the Note, and did not transfer or assign the Note to any other party or entity at any time  
 18 during the period at issue.<sup>48</sup>

19                   Second, Plaintiff's challenge to the endorsement of Sonja L. Lightfoot being invalidated  
 20 by questionable business practices, SAC, ¶¶ 33-34,) lacks merit.<sup>49</sup> It is Green Tree's knowledge  
 21 and belief that Lightfoot endorsed the Note in or about May, 2007.<sup>50</sup> Endorsement of the Note by  
 22 Lightfoot occurred prior to imposition of the TRO in Ex. N of the Complaint, which reflects an

23  
 24                   <sup>46</sup> SAC, ¶¶ 31-32.

25                   <sup>47</sup> Green Tree Declaration, ¶ 8.

26                   <sup>48</sup> Green Tree Declaration, ¶¶ 8-9.

27                   <sup>49</sup> See also the Press Release from the U.S. Attorney's Office 1/15/2013: <http://www.fbi.gov/seattle/press-releases/2013/mortgage-fraud-co-schemers-sentenced-in-case-that-crippled-pierce-commercial-bank>, which also states that the identified fraudulent loans had to be repurchased by PCB; that did not occur here.

<sup>50</sup> Green Tree Declaration, ¶ 13.

1 August 22, 2011 date. Also, the acts that subjected Lightfoot to criminal prosecution did not  
 2 involve endorsements to Notes. Defendants respectfully request this Court take judicial notice of  
 3 Case No. 3:11-cr-05394-BHS as filed in the Western District of Washington (“Criminal Case”).  
 4 The activities at issue with Lightfoot involved allegations of loan origination, and more  
 5 specifically, assisting prospective borrowers in falsifying loan applications to the extent loans  
 6 would be underwritten for otherwise ineligible borrowers, and the subsequent sale of these loans  
 7 on the secondary market (Criminal Case, Document No. 4 “Indictment”, ¶¶ 14-15, 26-27. See  
 8 also *Plea Agreement* entered as Docket Item No. 117).

9       Lastly, Plaintiff makes the unsupported allegation that MERS “never [has] anything to do  
 10 with the note” and references Exhibits “Q” and “P.” SAC, ¶ 20. Defendants admit that MERS is  
 11 not a party to the Note and does not take possession of original loan documents. MERS is not a  
 12 mortgage loan originator, lender or servicer; MERS’ role is to act as record beneficiary on deeds  
 13 of trust as nominee (agent) for the beneficial owner of the mortgage loan secured by the MERS  
 14 deed of trust. MERS was the nominee for Pierce Commercial Bank and its successors and/or  
 15 assigns in interest, and had a limited agency relationship with each note-holder since origination.  
 16 Plaintiff’s own Deed of Trust supports this: “Borrower understands and agrees that MERS holds  
 17 only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to  
 18 comply with law or custom, MERS (as nominee for Lender and Lender’s successors and assigns)  
 19 has the right: to exercise any or all of those interests, including, but not limited to, the right to  
 20 foreclose and sell the Property; and to take any action required of Lender including, but not  
 21 limited to, releasing and cancelling this Security Instrument.”<sup>51</sup> Moreover, MERS is an agent and  
 22 can act as an agent for the holder of a note. *Bain*, 175 Wn.2d at 106; *Zhong*, 2013 WL 5530583,  
 23 \*3. MERS executed an Assignment to Green Tree Servicing, LLC,<sup>52</sup> and Green Tree executed  
 24 the Appointment of Successor Trustee.<sup>53</sup> MERS is not a named entity in the Note, never claimed

25  
 26 <sup>51</sup> See RJD at ¶ 1, Ex. 1.  
 27 <sup>52</sup> RJD at ¶ 2, Ex. 2  
<sup>53</sup> RJD at ¶ 3, Ex. 3

1 possession or ownership of the Note to Plaintiff or any other party, and did not act beyond its  
 2 contractual scope of authority.

3                   ***E. Plaintiff's robo-signing allegations are baseless.***

4 Plaintiff claims Defendants used “computerized signatures” on the Assignment but fails to  
 5 prove this occurred, that Plaintiff has standing to challenge the Assignment, or that he suffered  
 6 any harm as a result. “Plaintiffs argue that they have been injured by the alleged improper signing  
 7 of reconveyance documents .... Plaintiffs point the Court to no Washington state authority to  
 8 support those legal conclusions. ...Absent some legal or expert authority supporting their claim,  
 9 Plaintiffs' assertion that the allegedly robo-signed documents interfere with their chain of title is  
 10 entirely speculative.” *Reid v. Countrywide Bank, N.A.*, No. C13-0099-JCC, 2013 U.S. Dist.  
 11 LEXIS 185460 (W.D. Wash. Nov. 1, 2013). Additionally,

12 Plaintiff's second argument relates to so-called “robo-signing” of the documents  
 13 used to initiate foreclosure proceedings. Even assuming for the sake of argument  
 14 that the assignments in question were fraudulently executed, Plaintiff, as a third  
 party, lacks standing to challenge them. ... Defendants are entitled to summary  
 judgment on these claims.

15 *Upkoma*, 2013 WL 1934172 at \*4. (internal citations omitted).

16       Here Plaintiff's alleged “harm” is that, for some unknown reason he “relied” upon the  
 17 “alleged copy ... of the Assignment but now feels that he has been misled.” SAC, ¶ 70. That is  
 18 not enough to establish a CPA violation.

19                   **4. Plaintiff's “Emotional Distress” Claim Fails**

20 Plaintiff claims “infliction of emotional distress” in the Complaint, but fails to plead the  
 21 specific type alleged to have been inflicted, the specific acts that led to this claim, and the  
 22 resulting damages. The Court has determined that Plaintiff's claim is for intentional infliction of  
 23 emotional distress.<sup>54</sup> IIED is also known as the tort of outrage. *Vawter v. Quality Loan Serv.*  
 24 *Corp.*, 707 F. Supp. 2d 1115, 1127 (W.D. Wash. 2010).

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 54 See Docket no. 92 at 3:1-2 (“Bigelow asserts causes of action for violation of the FDCPA, DTA, CPA, slander of title, and intentional infliction of emotional distress ('IIED').

1 On an outrage claim, Plaintiff is required to prove “three elements: (1) extreme and  
 2 outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result  
 3 to plaintiff of severe emotional distress.” *Vawter.*, 707 F. Supp. 2d at 1128. “The tort of outrage  
 4 does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other  
 5 trivialities.” *Anderson v. City of Bellevue*, 862 F. Supp. 2d 1095, 1110 (W.D. Wash. 2012). This  
 6 Court can make a determination on the IIED claim without a jury trial. *Cf. Dicomes v. State*, 113  
 7 Wash. 2d 612, 782 P.2d 1002, 1013 (1989) (“The question of whether certain conduct is  
 8 sufficiently outrageous is ordinarily for the jury, but it is initially for the court to determine if  
 9 reasonable minds could differ on whether the conduct was sufficiently extreme to result in  
 10 liability.”)

11 “The first element requires proof that the conduct was 'so outrageous in character, and so  
 12 extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious,  
 13 and utterly intolerable in a civilized community.'” *Robel v. Roundup Corp.*, 148 Wash. 2d 35, 59  
 14 P.3d 611, 619 (2002) (quoting *Dicomes*, 782 P.2d at 1012). The standard requires that Plaintiff  
 15 show the conduct was so extreme that it would cause severe emotional distress. *Vawter*, 707  
 16 F.Supp.2d at 1128; Even where the actions in connection with a foreclosure process may be  
 17 problematic, troubling, or even deplorable, “these actions do not involve physical threats,  
 18 emotional abuse, or other personal indignities aimed at” Plaintiff. *Vawter*, 707 F.Supp.2d at 1128.

19 Allegations as to the third element, the actual result of emotional distress, must go beyond  
 20 “bare and conclusory allegations . . . that he ‘became emotionally distressed,’ that the distress  
 21 ‘manifested itself in physical symptoms,’ and that he ‘obtained treatment’ for his distress and  
 22 symptoms are a mere ‘formulaic recitation of the elements of a cause of action’ and in the absence  
 23 of factual detail are wholly insufficient to state a claim. *Phillips v. KIRO-TV, Inc.*, 817 F. Supp. 2d  
 24 1317, 1325 (W.D. Wash. 2011) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct.  
 25 1955, 167 L. Ed. 2d 929 (2007)).

26 Here Plaintiff failed to plead any element of the IIED claim as to any Defendant; the  
 27 complaint states only that “Because of the many misrepresentations by Defendants, Plaintiff has

1 suffered mental and emotional anguish. Plaintiff has suffered damages caused by a divorce which  
 2 severed the marital community.” SAC ¶ 162. Plaintiff’s only other claim states “Plaintiff alleges  
 3 that the Defendants . . . have intentionally or negligently taken false and misleading actions which  
 4 have caused Plaintiff severe emotional distress as the family life he was accustomed to unraveled.”  
 5 SAC ¶ 232. Neither of these statements shows extreme or outrageous conduct, or even conduct  
 6 that could be considered troubling, and that Plaintiff’s emotional distress could be the only result.

7 Further, the “family life” Plaintiff references in relation to both statements in support of his  
 8 IIED claim “unraveled” prior to any involvement by WFZ or Parker. See, RJD 6, which clearly  
 9 shows Plaintiff’s divorce from Carolyn Bigelow was completed prior to this litigation.<sup>55</sup> Plaintiff  
 10 fails to show that WFZ and Parker had involvement with Plaintiff prior to litigation.

11 **5. Plaintiff’s “FDCPA” claim fails**

12 In order to plead a claim for violation of the FDCPA, a plaintiff is required to allege facts  
 13 demonstrating that (1) Defendants were collecting debt as debt collectors, and (2) Defendants’ debt  
 14 collection actions violated federal statute. *See Jerman v. Carlisle, et al.*, 559 U.S. 573, 130 S.Ct.  
 15 1605, 1606 (2010) (citing 15 U.S.C. § 1692 et seq.). “The test for determining whether a debt  
 16 collector violated the FDCPA is objective and does not depend on whether the debt collector  
 17 intended to deceive or mislead the consumer.” *Clark v. Capital Credit & Collection Serv., Inc.*,  
 18 460 F.3d 1162, 1171 (9th Cir. 2006). The “least sophisticated” debtor standard applies; “the  
 19 liability analysis turns on whether a debt collector’s communications would mislead an  
 20 unsophisticated but reasonable consumer.” *Id.* The Court further finds that the non-judicial  
 21 foreclosure proceeding at issue is not an attempt to collect a ‘debt’ for FDCPA purposes.”  
 22 *Mansour v. Cal-W. Reconveyance Corp.*, 618 F. Supp. 2d 1178, 1182 (D. Ariz. 2009).

23 Here, Plaintiff did not allege any facts demonstrating Green Tree violated the FDCPA.  
 24 Instead, Plaintiff improperly concludes MERS recorded an Assignment without the ability to do  
 25

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26  
 27 <sup>55</sup> Docket no. 67 at ¶ 7.

1 so, SAC, ¶ 57, incorrectly states MERS appointed the Successor Trustee, SAC, ¶ 83, and that  
 2 Defendants all took “action they could not legally take” (SAC, ¶ 194).<sup>56</sup>

3 In order for Plaintiff to reasonably make a claim for violation of the FDCPA, Plaintiff is  
 4 required to show Green Tree used “unfair or unconscionable means to collect or attempt to collect  
 5 its debt” by “[t]aking or threatening to take any nonjudicial action to effect dispossession or  
 6 disablement of property if there is no present right to possession of the property claimed as  
 7 collateral through an enforceable security interest.” 15 U.S.C. § 1692f(6)(A).

8 Plaintiff executed a Note and a Deed of Trust, using the Subject Property as security for  
 9 repayment of the debt. It is undisputed that the Loan has been in default since November, 2011.<sup>57</sup>  
 10 Therefore Plaintiff knows he owes some party for payments required by the Note, and could  
 11 reasonably expect the Subject Property could be foreclosed if payments were not tendered each  
 12 month. Plaintiff also demonstrates he had knowledge that payments were to be made to Green  
 13 Tree. See SAC, Ex. C, E, G, I, K, L, and M, *see also*, SAC at ¶ 145; RJN, Exs. 6-C and 6-D.

14 Next, Plaintiff fails to show Green Tree used “false, deceptive, or misleading representation  
 15 or means in connection with the collection of [the] debt” under 11 U.S.C. § 1692e(10). “An  
 16 allegedly false or misleading representation is not actionable under the FDCPA unless it is  
 17 material.” *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027, 1033 (9th Cir.2010). Plaintiff does not  
 18 allege or show Green Tree provided misleading information that was material to, or caused his  
 19 default, such as providing an incorrect payment address or failing to credit tendered payments.

20 Instead, Plaintiff bases his entire claim on the right of Green Tree to act as holder of the  
 21 Note. “To preserve the protections and policies of the FDCPA, it is important to know the proper  
 22 identity of the creditor. Knowing a creditor’s identity allows the ‘least sophisticated consumer’ to  
 23 make more informed decisions on how to communicate with the creditor and avoid being misled.”  
 24 *Isham v. Gurstel, Staloch & Charge, P.A.*, 738 F. Supp. 2d 986, 996 (D. Ariz.2010). Plaintiff’s  
 25 complaint and exhibits clearly demonstrate knowledge that Green Tree was the creditor (*see, e.g.*  
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27<sup>56</sup> Plaintiff’s FDCPA claims were dismissed as to MERS, WFZ and Parker. Docket no. 92.

<sup>57</sup> Docket no. 92, ¶ 29: “It is undisputed that Bigelow failed to make his November 1, 2011 payment...”).

1 Plaintiff's Exhibits E, G, K, L and M, filed as Docket Item No. 1-1), and he affirmed this  
 2 knowledge in divorce documents executed prior to the litigation.<sup>58</sup>

3 Plaintiff's claim under 11 U.S.C. § 1692e(5), wherein Plaintiff alleges Green Tree  
 4 threatened to take, or took an action it could not legally take, appears to be solely based on the  
 5 premise that the naming of MERS on the Deed of Trust invalidated the document under *Bain*, 175  
 6 Wn.2d at 117, and that by extension, because MERS could not assign the Deed of Trust, all  
 7 subsequent actions by Green Tree constituted an FDCPA violation. Complaint, ¶ 194.

8 Although Plaintiff includes QWR and/or debt validation responses in support of his  
 9 allegations of "threats" by Green Tree, Plaintiff's exhibits do not appear to support an FDCPA  
 10 claim to the extent an "unsophisticated but reasonable consumer" would have been gravely misled  
 11 by the contents of the correspondences (or any of the recorded documents for that matter). None  
 12 of these correspondences contained "empty threats" used as a means to coerce payment from  
 13 Plaintiff to which it was not entitled. *See, Lensch v. Armada Corporation*, 795 F. Supp. 2d 1180,  
 14 1185 (W.D. Wash. Jun. 13, 2011).

15 Also, Plaintiff fails to make the allegation that he was "deceived by characterization of  
 16 MERS as a beneficiary on the Deed of Trust." *Zalac v. CTX Mortg. Corp.*, No. C12-01474 MJP,  
 17 2013 U.S. Dist. LEXIS 20269, 2013 WL 1990728 at\*3 (W.D. Wash. 2013). Plaintiff did not file  
 18 one single exhibit showing he contacted, or even attempted to contact MERS for clarification on  
 19 ownership of the Loan. Likewise, Plaintiff fails to prove MERS sent any communications to  
 20 Plaintiff in furtherance of collection under the Note, and the SAC even states MERS disavowed  
 21 any connection with the Note (SAC, ¶ 20). Accordingly, Defendants did not violate 15 U.S.C. §  
 22 1692e(10) and the claim must be dismissed.

23     ///  
 24     ///  
 25     ///  
 26     ///  
 27     ///

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<sup>58</sup> RJN, Ex. 6.

## VI. CONCLUSION

Based upon the foregoing, Defendants respectfully request that this Court grant their Motion for Summary Judgment and dismiss Plaintiff's claims as to all Defendants with prejudice.

Dated: May 25, 2016

Respectfully submitted,  
**WRIGHT, FINLAY & ZAK, LLP**

/s/Ryan M. Carson  
Ryan M. Carson WSBA #41057  
Attorney for Defendants,  
DITECH FINANCIAL LLC as  
to GREEN TREE LOAN SERV  
MORTGAGE ELECTRONIC R  
SYSTEMS, INC., WRIGHT, FI  
and RENEE M. PARKER, ESQ

## **DECLARATION OF SERVICE**

The undersigned declares as follows:

On May 25, 2016, I served the foregoing document: **NOTICE OF MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS GREEN TREE SERVICING LLC, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., WRIGHT, FINLAY & ZAK, LLP AND RENEE PARKER, MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS GREEN TREE SERVICING LLC, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., WRIGHT, FINLAY & ZAK, LLP AND RENEE PARKER** on the following individuals by U.S. Mail, postage prepaid:

**SERVICE VIA U.S. MAIL:**

PLAINTIFF

James A Bigelow  
20704 2nd Ave W  
Lynnwood, WA 98036

## SERVICE VIA CM/ECF:

PLAINTIFF

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I declare under penalty of perjury under the laws of the State of Washington and the United States of America that the foregoing is true and correct.

DATED this 25<sup>th</sup> day of May, 2016

/s/Karina Yefimov  
Karina Yefimov